

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



ORIGINAL 3  
Page 5

**74-2138**

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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JANET GOTKIN and PAUL GOTKIN, individually and on behalf of all  
persons similarly situated,

*Plaintiffs-Appellants,*

—against—

ALAN D. MILLER, individually and as Commissioner of Mental Hygiene  
of the State of New York, MORTON B. WALLACH, individually  
and as Director of Brooklyn State Hospital, CHARLES J. RABINER,  
individually and as Director of Hillside Medical Center, and MARVIN  
LIPKOWITZ, individually and as Director of Gracie Square Hospital,

*Defendants-Appellees.*

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**On Appeal From the United States District Court  
For the Eastern District of New York**

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**BRIEF FOR DEFENDANTS-APPELLEES CHARLES J.  
RABINER AND LONG ISLAND JEWISH-HILLSIDE  
MEDICAL CENTER**

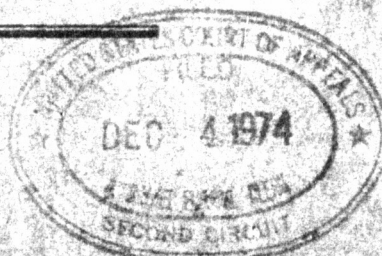
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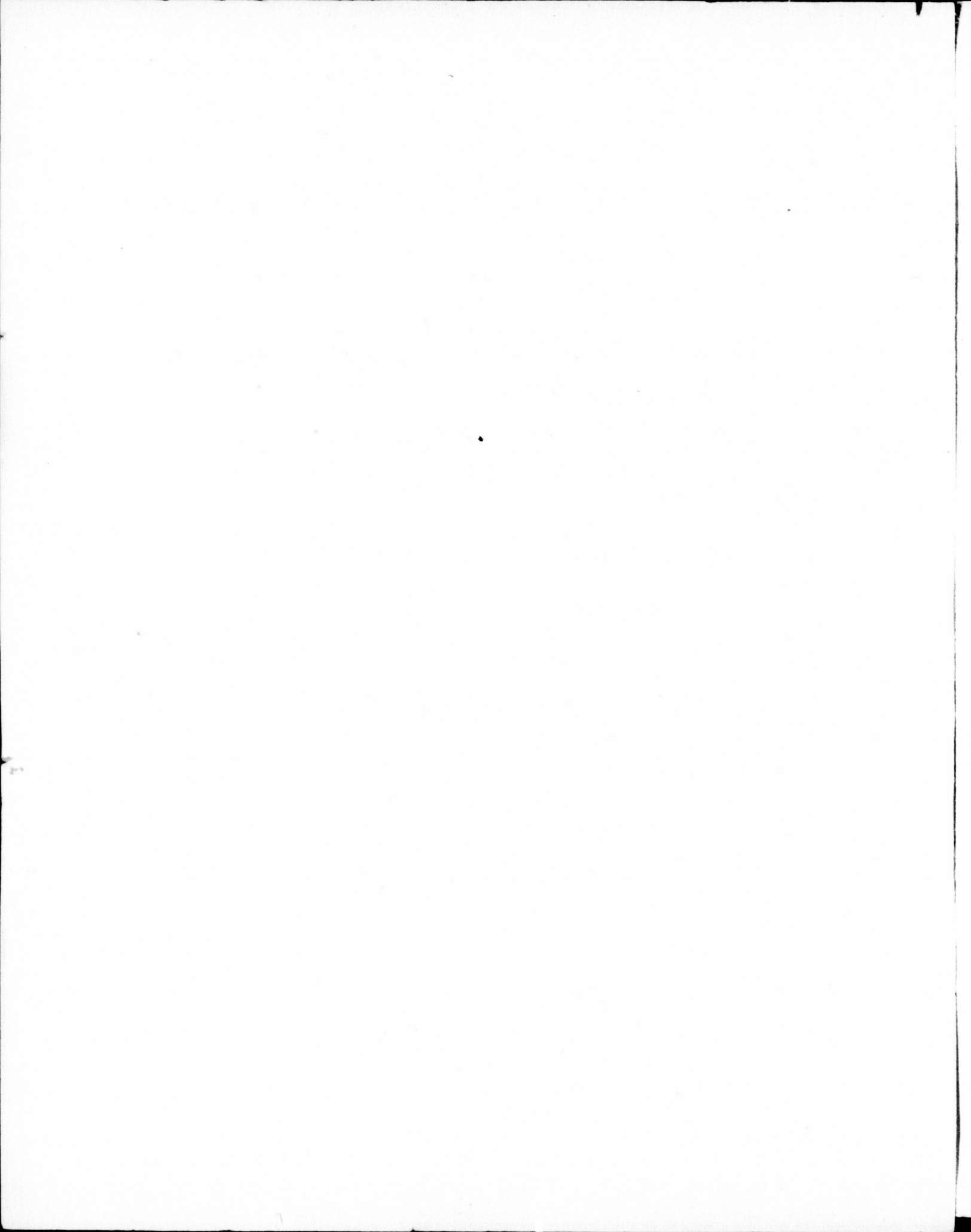
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# TABLE OF CONTENTS

	<u>Page</u>
Table of Citations . . . . .	ii
Introductory Remarks . . . . .	1
Statement of the Questions Presented . . . . .	2
Facts . . . . .	3
 ARGUMENT	
I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEIR "PROPERTY" OR "LIBERTY" IS AT STAKE AND THEREFORE CANNOT INVOKE THE PROTECTION OF THE FOURTEENTH AMENDMENT . . . . .	6
A. <u>Plaintiffs' "property" is not at stake</u> . . . . .	7
B. <u>Plaintiffs' "liberty" is not at stake</u> . . . . .	26
II. THE ACTIONS OF DEFENDANTS RABINER AND LONG ISLAND JEWISH-HILLSIDE MEDICAL CENTER WERE NOT PERFORMED UNDER COLOR OF STATE LAW AND DID NOT AMOUNT TO STATE ACTION. THEREFORE, THE PLAIN- TIFFS CANNOT INVOKE THE PROTECTION OF THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983 . . . . .	28
III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A VIOLATION OF ANY OTHER CONSTITU- TIONAL PROVISION . . . . .	33
IV. JUDGMENT IN FAVOR OF THE DEFENDANTS AS A MATTER OF LAW WAS APPROPRIATE . . . . .	34
CONCLUSION . . . . .	36

# TABLE OF CITATIONS

	<u>Page</u>
<u>Afroyim v. Rusk</u> , 387 U.S. 253, 87 S. Ct. 1660 (1967)	12
<u>Application of Weiss</u> , 208 Misc. 1010, 147 N.Y.S. 2d 455 (Sup. Ct. 1955)	18
<u>Arnett v. Kennedy</u> , __ U.S. __, 94 S. Ct. 1633 (1974)	26
<u>Bell v. Burson</u> , 402 U.S. 535, 91 S. Ct. 1586 (1971)	7
<u>Board of Regents of State Colleges v. Roth</u> , 408 U.S. 564, 92 S. Ct. 2701 (1972)	7-12, 14, 15, 18, 26
<u>Briker v. Sceva Speare Memorial Hospital</u> , 281 A. 2d 589 (N.H. 1971) <u>cert. denied</u> , 404 U.S. 995, 92 S. Ct. 535 (1971)	30
<u>Communications Workers of America, Local 10317 v. Methodist Hospital of Kentucky, Inc.</u> , 368 F. Supp. 564 (E.D. Ken. 1974)	30
<u>Cusumano v. Ratchford</u> , 373 F. Supp. 1128 (E.D. Mo. 1974)	13
<u>Fuentes v. Shevin</u> , 407 U.S. 67, 92 S. Ct. 1983 (1972)	6, 7
<u>Glazer v. Department of Hospitals</u> , 2 Misc. 2d 207, 155 N.Y.S. 2d 414 (Sup. Ct. 1956)	21, 22
<u>Goldberg v. Kelly</u> , 397 U.S. 254, 90 S. Ct. 1011 (1970)	7, 9
<u>Grafton v. Brooklyn Law School</u> , 478 F. 2d 1137 (2d Cir. 1973)	30, 32
<u>Hernandez v. European Auto Collision</u> , 346 F. Supp. 313 (E.D.N.Y. 1972)	28

	<u>Page</u>
<u>Hoyt v. Cornwall Hospital</u> , 169 Misc.361, 6 N.Y.S. 2d 1014 (Sup. Ct. 1938)	19
<u>In Re Culbertson</u> , 57 Misc. 2d 391, 292 N.Y.S. 2d 806 (Sur. Ct. 1968)	16, 19, 20
<u>In Re Greenberg's Estate</u> , 196 Misc. 809, 89 N.Y.S. 2d 807 (Sup. Ct. 1949)	18
<u>In Re Handwerger</u> , 79 N.Y.S. 2d 634 (Sup.Ct.1947) (n.o.r.)	19
<u>Jackson v. Norton-Childrens Hospital, Inc.</u> , 487 F. 2d 502 (6th Cir. 1973)	30
<u>Knapp v. Schweitzer</u> , 357 U.S. 371, 78 S. Ct.1302 (1958)	12
<u>Kelly v. Wisconsin Intercollegiate Athletic Assn.</u> 367 F. Supp. 1388 (E.D.Wis. 1974)	30
<u>Lightfoot v. Davis</u> , 198 N.Y. 261 (1910)	17
<u>Lipp v. Board of Education of City of Chicago</u> , 470 F. 2d 802 (7th Cir. 1972)	12
<u>Lynch v. Household Finance Corp.</u> , 405 U.S. 538, 92 S. Ct. 1113, <u>rehearing denied</u> , 406 U.S. 911, 92 S. Ct. 1611 (1972)	7
<u>McGuane v. Chenango Court, Inc.</u> , 431 F. 2d 1189 (2d Cir. 1970) cert. denied, 400 U.S. 1023, 91 S. Ct. 1231 (1972)	30
<u>Meyer v. Nebraska</u> , 262 U.S. 390, 43 S. Ct. 625 (1923)	26
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S. Ct. 2593 (1972)	6
<u>Moose Lodge No. 107 v. Irvis</u> , 407 U.S. 163, 92 S. Ct. 1965 (1972)	30

	<u>Page</u>
<u>Mullane v. Central Hanover Bank &amp; Trust Co.</u> , 339 U.S. 306, 70 S. Ct. 652 (1950)	8
<u>Mulvihill v. Julia L. Butterfield Memorial Hospital</u> , 329 F. Supp. 1020 (S.D.N.Y. 1971)	29
<u>Munzer v. State</u> , 41 N.Y.S. 2d 98 (Ct. Cl. 1943) (n.o.r.)	18
<u>Olsen v. Trustees of California State Univer- sities</u> , 351 F. Supp. 430 (C.D. Cal. 1972)	24
<u>Ortwein v. Mackey</u> , 358 F. Supp. 705 (M.D. Fla. 1973)	13
<u>Perkins v. Guaranty Trust Co. of N.Y.</u> , 274 N.Y. 250 (1937)	17
<u>Perry v. Sindermann</u> , 408 U.S. 593, 92 S. Ct. 2694 (1972)	9-12, 15, 21
<u>Pordum v. Board of Regents of State of New York</u> , 491 F. 2d 1281 (2d Cir. 1974)	6, 9, 12
<u>Powe v. Miles</u> , 407 F. 2d 73 (2d Cir. 1968)	28, 30, 32
<u>President and Directors of Manhattan Co. v. Morgan</u> , 199 App. Div. 767, 192 N.Y.S. 239 (1st Dept. 1922)	17
<u>Sams v. Ohio Valley General Hospital</u> , 413 F. 2d 826 (4th Cir. 1969)	31
<u>Shirley v. State National Bank of Connecticut</u> , 493 F. 2d 739 (2d Cir. 1974)	28
<u>Simkins v. Moses H. Cove Memorial Hospital</u> , 323 F. 2d 959 (4th Cir. 1964)	31
<u>Sosa v. Lincoln Hospital</u> , 190 Mis. 448, 74 N.Y.S. 2d 184 (Sup. Ct. 1947), aff'd, 273 A.D. 852, 77 N.Y.S. 2d 138 (1st Dept. 1948)	22, 23

	<u>Page</u>
<u>United States v. Causby</u> , 328 U.S. 256, 66 S. Ct. 1062 (1946)	13
<u>United States v. Certain Property Located in New York City</u> , 344 Fed. 2d 142 (2nd Cir. 1965)	14
<u>United States v. Price</u> , 383 U.S. 787, 86 S. Ct. 1152 (1966)	28
<u>United States ex rel. Tennessee Valley Authority v. Powelson</u> , 319 U.S. 266, 63 S. Ct. 1947 (1943)	13-14
<u>Van Allen v. McCleary</u> , 27 Misc. 2d 81, 211 N.Y.S. 2d 501 (Sup. Ct. 1961)	21
<u>Velger v. Cawley</u> , 366 F. Supp. 874 (S.D.N.Y. 1973)	13
<u>Wahba v. N.Y. University</u> , 492 F. 2d 96 (2d Cir. 1974)	32
<u>Ward v. St. Anthony Hospital</u> , 476 F. 2d 671 (10th Cir. 1973)	30
<u>Westphal v. State</u> , 191 Misc. 688, 79 N.Y.S.2d 634 (Ct. Cl. 1948)	18
<u>Wisconsin v. Constantineau</u> , 400 U.S. 433, 91 St. Ct. 507 (1971)	26

	<u>Page</u>
 <u>Statutes</u>	
N.Y.C.P.L.R., §4504 (McKinney's Supp.1974)	18
N.Y. Mental Hygiene Law §15.13 (McKinney's Supp. 1974)	24
N.Y. Public Health Law §17 (McKinney's Supp. 1974)	20

Treatises:

Annotation, Federal Courts: Federal or State Law As Applicable in Determining What is Property For Which Compensation Must Be Paid Upon Its Taking By the Federal Government, 1 A.L.R. Fed. 479	14
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### Introductory Remarks

At the suggestion of the Court's representative, the defendant hospitals and the Hospital Association of New York State (amicus curiae) have attempted to avoid briefing the same points where their interests are similar. Accordingly, at various places in this brief, reference is made to points in other briefs and the Court is asked to consider the points referred to as part of this brief.

In particular, the Court is respectfully referred to the brief of the Hospital Association of New York State for extensive policy arguments that are of considerable importance on this appeal.

The caption of this action names as a defendant "Charles D. Rabiner, individually and as Director of Hillside Medical Center." The hospital's correct name is Long Island Jewish-Hillside Medical Center and Dr. Rabiner is its Director of Psychiatry. This defect in pleading has been waived.

Statement of the Questions Presented

1. Do plaintiffs have a constitutionally guaranteed right of direct access to Mrs. Gotkin's hospital records which were created by and are maintained in the possession of the Long Island Jewish-Hillside Medical Center when plaintiffs' sole purpose in obtaining the records is to assist them in writing a book? (The District Court answered this question in the negative without reaching the question of "state action").

2. Did Long Island Jewish-Hillside Medical Center, a private voluntary hospital, act under color of state law so as to confer jurisdiction on the federal courts when they declined to grant to plaintiffs direct access to Mrs. Gotkin's hospital records? (The District Court did not reach this issue).

3. Did the District Court properly grant judgment in favor of the defendants as a matter of law after determining that plaintiffs' constitutional claims were without merit? (The District Court answered this question in the affirmative).

### FACTS

The plaintiffs asked the Court below to intervene and compel the Long Island Jewish-Hillside Medical Center (hereafter LIJ), and two other hospitals, to turn over to them the complete unscreened psychiatric record of Janet Gotkin concerning various periods of her confinement at the defendant hospitals over a period of some ten years (A-1; A-8).<sup>1</sup> The action was brought under the Civil Rights Act, 42 U.S.C. §1983 and 28 U.S.C. §1343. The plaintiff Paul Gotkin has never been a patient at any of the defendant hospitals and has no basis to present the claims involved in this suit (A-34; A-78). The information sought by plaintiffs is admittedly not for purposes related to medical care and treatment, but to verify and supplement material contained in a book they have written (A-4).

LIJ is a private voluntary hospital, existing under the Not-for-Profit Corporation Law of the State of New York (A-59). As part of its activities, LIJ operates a division for the care and treatment of persons suffering from mental disabilities (A-60). Dr. Rabiner is the Chairman of the Department of

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<sup>1</sup> Unless otherwise indicated, all numeral references are to the joint appendix on appeal.

Psychiatry at this division, known as the Hillside Division (A-52).

In order to facilitate the care and treatment of its patients at the Hillside Division, LIJ maintains records reflecting the complete progress of the patient (A-60). Such records contain, for example: admission and discharge history; diagnoses; observations; course of treatment; medication; internal memoranda; test results; physical examination data; psychological profiles; observations and conclusions of treating psychiatrists and social workers; interviews with third parties for the purpose of treating the patient and information obtained from them which will often include psychological evaluations of these third parties made as a result of those interviews (A-60). Although they relate to an individual patient, such records are the work product of LIJ employees and the property of LIJ (A-61).

LIJ has established an internal administrative policy which governs the release of such records (A-61). This policy is not mandated by any federal, state or local statute, ordinance, rule or regulation (A-61). In this sense, the records of LIJ must be distinguished from similar records maintained by facilities of the Department of Mental Hygiene of the State of New York, such as Brooklyn State Hospital, a

co-defendant in this action. Although LIJ does receive federal and state funding for various projects and is subject to state regulation of some of its activities, none of these contacts relate to its internal administrative policies (A-61).

Notwithstanding the fact that LIJ was under no obligation to do so, following plaintiff Janet Gotkin's request that LIJ provide her with a copy of her record of hospitalization, LIJ undertook a specific review of her record in accordance with its internal policy (A-67). While LIJ concluded that it would be inappropriate to release the record directly to Janet Gotkin, LIJ offered to release the record to a physician of Mrs. Gotkin's choice, upon receipt of proper authorization from her (A-67). This alternative was rejected by the plaintiffs.

POINT I

PLAINTIFFS HAVE FAILED TO DEMONSTRATE  
THAT THEIR "PROPERTY" OR "LIBERTY" IS  
AT STAKE AND THEREFORE CANNOT INVOKE  
THE PROTECTION OF THE FOURTEENTH  
AMENDMENT

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The plaintiffs have requested that the defendants be compelled to give them the psychiatric records of Janet Gotkin. They wish the records solely to verify factual information in a book they have written (a-4).

Plaintiffs claim that the defendants' failure to give them copies of Mrs. Gotkin's psychiatric records deprived them of their right to due process under the Fourteenth Amendment. This Court recently recognized that an evaluation of any due process claim "...must begin with the question of whether a 'liberty' or 'property' interest is at stake." Pordum v. Board of Regents of State of New York, 491 F. 2d 1281, 1283, (2d Cir. 1974). See also, e.g., Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972); Fuentes v. Shevin, 407 U.S. 67, 84, 92 S. Ct. 1983, 1996 (1972).

A. Plaintiffs' "property" is not at stake.

The Fourteenth Amendment contains no definition of the word "property". Neither has the Supreme Court given the word a precise definition. See, e.g., Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586 (1971); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970). It has, however, defined the parameters of constitutionally protected interests. Thus, in Board of Regents of State College v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), the Court stated that:

"...while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries." 408 U.S. at 572, 92 S. Ct. at 2706.

The Court then went on to state that:

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." 408 U.S. at 576, 92 S. Ct. at 2708. (Emphasis added).

Encompassed within this definition are the traditional elements of property. E.g., Fuentes v. Shevin, supra, 407 U.S. at 78-80, 92 S. Ct. at 1993-94 (ownership and possessory interests in automobiles); Lynch v. Household Finance

Corp., 405 U.S. 538, 552, 92 S. Ct. 1113, 1122, rehearing denied, 406 U.S. 911, 92 S. Ct. 1611 (1972) (ownership of household furniture); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950) (beneficiary's ownership of trust of corpus).

In addition to traditional property rights, the Court in Roth recognized that the Fourteenth Amendment also protected "property interests". The Court in Roth carefully set forth what must be demonstrated before something will be treated as a "property interest" for due process purposes.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577, 92 S. Ct. at 2709. (Emphasis added.)

For there to be a "legitimate claim of entitlement" to a benefit, that benefit must have been previously conferred or recognized by the state. 408 U.S. at 577-78, 92 S. Ct. at 2709.

For example, in Roth, a non-tenured teacher at a state university claimed that he was denied due process. At stake was his continued employment. The Court viewed this continued employment as a benefit, but held that Roth

had failed to show a "legitimate claim of entitlement."  
408 U.S. at 578, 92 S. Ct. at 2710. In Perry v. Sindermann,  
408 U.S. 593, 92 S. Ct. 2694 (1972), which was decided  
simultaneously with Roth and involved the same benefit, the  
Court found that a "legitimate claim of entitlement" might  
exist if an implied contract between the teacher and the  
state could be demonstrated. In Pordum v. Board of Regents  
of the State of New York, supra, also involving continued  
employment, the "legitimate claim of entitlement" arose  
from a statutory grant of tenure to a teacher. In Goldberg  
v. Kelly, supra, the benefit sought to be protected was the  
continued receipt of financial assistance. The Court found  
a "legitimate claim of entitlement" arose from federal and state  
statutes which granted financial assistance to qualified indi-  
viduals.

In analyzing the plaintiffs' claim, the Court below  
cited the following language of Roth and correctly held that  
whether plaintiffs had a "property interest" in Mrs. Gotkin's  
psychiatric record was substantially the result of state law.  
(A-84); 379 F. Supp. at 864.

"Property interests, of course, are not  
created by the Constitution. Rather,  
they are created and their dimensions

are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S. Ct. at 2709.

Plaintiffs dispute this fundamental rule and content that this determination must be made in accordance with federal common law. Brief of Plaintiff at 12.

Careful analysis of the Roth, Perry and other similar cases show that the final determination of whether a particular matter is a "property interest" meriting protection under the Fourteenth Amendment is controlled by state law.

In Roth, the plaintiff was a non-tenured teacher and under the laws of Wisconsin was not entitled to reasons or a hearing to challenge his termination of employment. In denying his right to due process, the Court stated:

"[T]he terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it." 408 U.S. at 578, 92 S. Ct. at 2710.

Although recognizing Roth's strong interest in re-employment, the Court felt this interest was not sufficiently recognized, as a matter of state law, to constitute a "property interest" that would be entitled to protection under the Fourteenth Amendment.

In comparison, the Court in Perry directed a hearing to determine whether Perry had a "property interest" in the continuation of his employment. The significant difference between Roth and Perry is that Perry had

"...alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. ...[he] claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure. Thus, [he] offered to prove that a teacher with his long period of service at this particular State College had no less a 'property' interest in continued employment than a formally tenured teacher...."  
408 U.S. at 599-600, 92 S. Ct. at 2699.  
(Footnote omitted. Emphasis added)

Indeed, the Court in Perry noted that

"If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the

respondent's claim would be defeated."  
408 U.S. at 602 n. 7, 92 S. Ct. at  
2700.

Thus, in both Roth and Perry the Supreme Court applied  
State law.<sup>2</sup>

In Pordum v. Board of Regents of the State of  
New York, 491 F. 2d 1281 (2d Cir. 1974), this Court  
recognized that it is State law which determines if a  
"property interest" is at stake. The Court noted that Pordum's  
"interest in his [teaching] certificate is a sufficient  
property interest to be protected by the due process  
clause..." since he was tenured under state law. In Lipp  
v. Board of Education of City of Chicago, 470 F. 2d 802  
(7th Cir. 1972), the Court held that no "property interest"  
existed since

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<sup>2</sup> The different results reached are the products of our  
federal structure. The Federal Government's power to act  
in any given circumstance is limited to the power expressly  
or by necessary implication granted to it by the Constitu-  
tion, and all other powers are reserved to the states pur-  
suant to the Tenth Amendment. See, Afroyim v. Rusk, 387  
U.S. 253, 257, 87 S. Ct. 1660, 1662 (1967); Knapp v.  
Schweitzer, 357 U.S. 371, 375, 78 S. Ct. 1302, 1305 (1958).  
Accordingly, the Fourteenth Amendment grants no power to  
the Federal Government to create property interests. Thus,  
their creation must depend on state law, as was noted in  
Roth. ("Property interests...are not created by the Consti-  
tution." 408 U.S. at 577, 92 S. Ct. at 2709.)

"state law made it clear to the plaintiff that he had no legitimate expectation that he was immune from dismissal, transfer or rating by his superiors." 470 F. 2d at 805 n. 5. (Citations omitted.)

See, also, Cusumano v. Ratchford, 373 F. Supp. 1128 (E.D. Mo. 1974); Ortwein v. Mackey, 358 F. Supp. 705 (M.D. Fla. 1973). Similarly, in Velger v. Cawley, 366 F. Supp. 874 (S.D.N.Y. 1973) Judge Gurfein denied a probationary patrolman's due process claim, and based his decision upon state law stating:

"Since, as a matter of State law, the probationary patrolman has no legitimate expectation of tenure, he has no such 'property' right as the Supreme Court defined in Roth." 366 F. Supp. at 877. (Emphasis added.)

While the foregoing cases arose in the context of continued employment, they are equally applicable in determining whether other kinds of property interest claims are to be protected by the due process clause. Significantly, none of these cases give even passing mention to any Federal common law of property.

The plaintiffs, in support of their position that federal law should control, rely on United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946) and United States ex rel.

Tennessee Valley Authority v. Powelson, 319 U.S. 266, 63 S. Ct. 1047 (1943). In fact, neither of these cases support the proposition for which plaintiffs cite them. The language, as contained in Causby (citing Powelson), is as follows:

"[W]hile the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its content by reference to local law'." 328 U.S. at 266, 66 S. Ct. at 1068.

Thus, even in Fifth Amendment cases, involving federal condemnation, the threshold question of whether "property" has been taken will be determined by the law of the state where the property is located. See also, United States v.

Certain Property Located in New York City, 344 F. 2d 142

(2d Cir. 1965); Annotation, Federal Courts: Federal or State Law As Applicable in Determining What is Property for Which Compensation Must Be Paid Upon Its Taking by the Federal Government, 1 A.L.R. Fed. 479.

Plaintiffs' reliance on decisions in other jurisdictions (Brief of Plaintiff at 19) is of no assistance in view of Roth's mandate. It would be anomolous for a teacher asserting a property interest, as in Roth, to base his claim of entitlement on the fact that teachers in some

other state or at some other state university are granted either tenure or defacto tenure under similar circumstances, when no such policy exists at his university. To reach any other conclusion would ignore the results reached in Roth and Perry.

Before turning to an examination of State Law, it is important to examine the nature of the psychiatric records which the plaintiffs seek. The records contain, among other things: admission and discharge history; diagnosis; observation; course of treatment; medication; internal memorandums; test results; physical examination data; psychological profiles; observations and conclusions of treating psychiatrists, psychologists and social workers; information about the patient which is received from third parties; and psychological evaluations of such third parties. (A-60). The records are prepared by members of the defendants' staff, including treating physicians, psychiatrists, psychologists and nurses and document the entire course of treatment of the patient (A-60-61). They are maintained primarily for the purpose of assisting the defendants in the delivery of effective patient care (A-61). They are also of invaluable assistance to any future treating

physician since they represent the past psychiatric history of a patient.

Although the plaintiffs claim ownership of these records, the facts do not support that conclusion. This is particularly so in light of New York law, which establishes that medical records are the property of the hospital or physician who has prepared them. In this connection, the leading case is In Re Culbertson, 57 Misc. 2d 391, 292 N.Y.S. 2d 806 (Sur. Ct. 1968). There, the petitioners sought to compel the delivery to them of their medical records or in the alternative, they sought permission to examine and make copies of their records. Those records had been prepared and maintained by a physician during his lifetime. Addressing itself to the question of ownership, the Court stated:

"This Court is satisfied...that records taken by a Doctor in the examination and treatment of a patient become property belonging to the Doctor. Generally speaking, an individual does not seek out a doctor for the purpose of obtaining records for his personal use, but seeks the personal services of his physician in the area of examination, diagnosis and treatment. The cost of X-rays, cardiograms, etc. and the reports thereof, although paid by the patient, are records supplied to the physician for his personal use in connection with the examination, diagnosis and treatment of the

patient. The records and notes that accordingly come into the possession of the physician constitute a history of the case of benefit only to a physician as part of his clinical record concerning a particular patient." 292 N.Y.S. 2d at 807-8.

The plaintiffs' bare assertion in their brief that they are the owners of these records cannot stand in the face of this clear statement of New York law.

Furthermore, it is undisputed that these records were created by the defendants and that since then have been in the exclusive possession and control of the defendants. This exclusive possession and control is strong evidence of the defendants' ownership. See, Perkins v. Guaranty Trust Co. of N.Y., 274 N.Y. 250, 261 (1937); Lightfoot v. Davis, 198 N.Y. 261 (1910); President and Directors of Manhattan Co. v. Morgan, 199 App. Div. 767, 192 N.Y.S. 239 (1st Dept. 1922).

Plaintiffs' claim of ownership to the records based on a right to exclude access to others (Brief of Plaintiff at 26) is logically defective and is without merit. While an owner may have the right to exclude others, the existence of the right to exclude does not make one an owner. Indeed, at common law, the plaintiffs had no right to exclude others from access to their medical records.

Munzer v. State, 41 N.Y.S. 2d 98 (Ct. Cl. 1943) (n.o.r.).

Any such right that plaintiffs have arises solely by virtue of New York State's enactment of a statutory privilege which does not create in plaintiffs any ownership interest to the records in question. N.Y.C.P.L.R. §4504 (McKinney's Supp. 1974). See also, Westphal v. State, 191 Misc. 688, 79 N.Y.S. 2d 634, 639 (Ct. Cl. 1948).

Since plaintiffs clearly lack any traditional property rights in the records sought, their due process claim can be viable only if they demonstrate that the asserted right of access is a recognized "property interest". Board of Regents of State College v. Roth, supra. This they cannot do!<sup>3</sup>

In New York, the Courts have recognized patients' rights to receive copies of their hospital records only where they are necessary for the purposes of litigation. E.g., Application of Weiss, 208 Misc. 1010, 147 N.Y.S. 2d 455 (Sup. Ct. 1955); In re Greenberg's Estate, 196 Misc. 809,

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Plaintiffs acknowledge that they have no "recognized" right of access to the hospital's records under any existing law. Thus, in instituting this action, they state that "The Gotkins sought to obtain judicial recognition of the right of Janet Gotkin and other former mental patients of access to their own hospital records." Brief of Plaintiff at 2.

89 N.Y.S. 2d 807 (Sup. Ct. 1949); Hoyt v. Cornwall Hospital, 169 Misc. 361, 6 N.Y.S. 2d 1014 (Sup. Ct. 1938).<sup>4</sup>

It should also be noted that in each of these cases, access was permitted pursuant to a specific procedural rule of New York practice. Nevertheless, if the Gotkins sought the records in this action for the purposes of litigation, it might be argued that the prior recognition of the right to receive such records for that purpose by New York Courts gives them "a legitimate claim of entitlement". This, however, is not the plaintiffs' purpose and to the extent that New York gives a patient a "legitimate claim of entitlement" to his hospital records for purposes of litigation, it is not relevant to this proceeding.

In addition to litigation purposes, an examination of In re Culbertson, supra, indicates a recognition of two other circumstances under which a patient's claim to access might rise to the level of a "property interest" entitled to due process protection. Specifically, those interests relate to the preservation of the records and the transfer of the records to another physician or hospital for the

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<sup>4</sup> In this connection, where the records involved are those of mental patients, New York has recognized that they are of a more "highly confidential nature." In re Handwerger, 79 N.Y.S. 2d 634 (Sup. Ct. 1947) (n.o.r.).

purpose of treatment.<sup>5</sup> 292 N.Y.S. 2d at 810. However, there is no issue of destruction in this case, nor is there a claim that the defendants have refused to provide the plaintiff's physician with the medical records sought. On the contrary, the defendants have offered to give copies of the plaintiff's records to a physician of her choice (A-22; A-67). This alternative was rejected by the plaintiffs.

Turning to the specific interest which the plaintiffs seek to have protected by the Fourteenth Amendment, the Court in Culbertson specifically denied the right to or the existence of the benefit claimed. In Culbertson the Court denied several patients direct access to their records despite the fact that they alleged that

"...examinations and tests were made with the intent and understanding that they would be recorded and would become

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<sup>5</sup> This latter interest, relating to treatment, has recently been codified in Public Health Law Sec. 17 (McKinney's Supp. 1974). While this provision is not directly applicable to this proceeding in view of the fact that it was not effective until well after this action was commenced, it is indicative of the limited circumstances under which a hospital is required to give up its control of a patient's medical record. Moreover, this section excludes access to the personal notes of the physician or hospital. The full text of this section is set forth in the Appendix to this brief.

part of their permanent record and as such would always be available to [them].

Petitioners contend that this is a matter of contract where the[physician] has agreed for a valuable consideration to make and preserve records and to make them available at all times to the petitioners." 292 N.Y.S. 2d at 807.

Clearly, the plaintiffs could not establish either a contract right to access under New York law or even a tacit understanding as the Court in Perry v. Sindermann, supra, indicated might give rise to a legitimate claim of entitlement.

The plaintiffs contend that the right of access which they seek is recognized as a matter of common law. Brief of Plaintiff at 15. In support of that proposition, the plaintiffs cite Van Allen v. McCleary, 27 Misc. 2d 81, 211 N.Y.S. 2d 501 (Sup. Ct. 1961). While that case does contain a statement to that effect, the statement is pure dicta and is erroneous. That case dealt solely with a question of access to the public school records of a pupil.

Furthermore, in Van Allen, the Court cited Glaser v. Department of Hospitals, 2 Misc. 2d 207, 155 N.Y.S. 2d 414 (Sup. Ct. 1956) in support of its conclusion that a common law right of access to medical records exists. An

examination of Glazer indicates that no such statement or conclusion was made in that case. In Glazer, the plaintiff sought an order directing the Department of Hospitals of the City of New York to furnish her with a copy of her hospital records for use in a negligence action against a third party. The hospital refused to furnish the record until such time as the plaintiff had executed an assignment in favor of the hospital. The Court held that it was unlawful to require the execution of such an assignment before supplying information to which the patient has a right. In that connection, the Court indicated that the patient's right was based on her need for the information in connection with a pending litigation. Thus, Glazer falls into that line of cases in New York which recognizes a patient's interest in the medical record where it is necessary for purposes of litigation. 155 N.Y.S. 2d at 421.

Plaintiffs' reliance on Sosa v. Lincoln Hospital, 190 Misc. 448, 74 N.Y.S. 2d 184 (Sup. Ct. 1947), aff'd, 273 App. Div. 852, 77 N.Y.S. 2d 138 (1st Dept. 1948) is also misplaced. In that case, a mother who was apprehensive that a hospital of the City of New York had given her the wrong baby, was permitted to inspect her medical records

pursuant to Section 894 of the City Charter, a provision which authorized inspection of certain records of New York City departments. Sosa created no common law right of access to medical records. At best, it merely recognized a limited right to inspect records of City hospitals pursuant to a specific City Charter provision where there was a "legitimate and reasonable purpose shown". Accordingly, Sosa cannot be relied upon by plaintiffs for their claim of "property interest" since the defendant hospitals are not City owned and are not subject to the provisions of the City Charter.<sup>6</sup>

The plaintiff's contention that New York recognizes a "property interest" as regards a former patient's access to medical records is also inconsistent with Mental

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<sup>6</sup> Even if Sosa is seen as a case where the court granted access to medical records solely because there was a legitimate and reasonable purpose, the case is of little assistance to the plaintiffs' entitlement argument. The very statement of such a rule bespeaks the inability of the plaintiffs to show a "legitimate claim of entitlement" under it, for if they must first demonstrate to a court that their claim is "legitimate and reasonable", they cannot have an "already acquired" interest, as required by Roth. Moreover, the compelling circumstances of a mother's search for her proper child and the specter of litigation, both of which existed in Sosa, are absent from the facts in plaintiffs' case.

Hygiene Law Section 15.13 (McKinney's Supp. 1974).<sup>7</sup> That section sets forth the circumstances under which a State facility will provide copies of medical records of former patients in mental facilities. (A-85, A-87). As the Court below noted:

"...the statute establishes a general rule of non-disclosure and only permits access to a mental hospital medical file in a limited number of enumerated situations." (A-87). 379 F. Supp. at 865.

Although this statute only applies to facilities operated by the State of New York, it comports with case law recognizing the circumstances in which records should be made available.

No more appropriate summary of the result which should be reached by this Court can be found than the summary contained in Olsen v. Trustees of California State Universities, 351 F. Supp. 430, 435 (C.D. Cal. 1972).

"Roth clearly states that 'the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.'...Moreover, those interests and benefits can assume many forms. The flaw in [plaintiff's] case, however, is that he has not yet obtained any interest. The words 'already acquired' are controlling in Justice Stewart's passage above. If an

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<sup>7</sup> For the full text of this statute, see A-85 through A-87.

individual does not possess, or enjoy  
imminent access to such an interest,  
i.e., something tangible, he cannot use  
the Federal courts to bolster his chances  
or meet his hopes, or answer his prayers.  
(Emphasis added. Citation omitted.)

In this case, precisely what has Janet Gotkin acquired?  
A contractual guarantee? The record does not support  
such a claim, nor is such a claim advanced by the plain-  
tiffs. A statutory or common law right? New York law  
would not support such an allegation. A mutual explicit  
understanding, a quasi contract? Even were such a con-  
tention made, In re Culbertson, supra, dispels its appli-  
cation to medical records. A reasonable expectation?  
The policy of all of the defendants negates such a  
contention. In fact, all that plaintiffs have shown  
is an abstract need, a desire, a unilateral expectation  
of access to their medical records.

B. Plaintiffs' "liberty" is not at stake.

For the concept of "liberty" which is embodied in the Fourteenth Amendment to be at stake, a plaintiff must show that the government's action injured his "good name, reputation, honor or integrity" [(Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 St. Ct. 507, 510 (1971))] and that this injury deprives him of one of "those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923). See also Arnett v. Kennedy, \_\_\_ U.S. \_\_\_, \_\_\_, 94 S. Ct. 1633, 1644 (1974); Board of Regents of State College v. Roth, supra, 408 U.S. at 573, 92 S. Ct. at 2707.

Plaintiffs base their "liberty" argument on the claim that the defendant hospitals have stigmatized Mrs. Gotkin by labelling her as "mentally unfit." The record does not support this argument. Mrs. Gotkin was a voluntary patient who received psychiatric treatment at the defendant hospitals. (A-2; A-18; A-34; A-78). Defendants have made no statements to the public or even privately regarding Mrs. Gotkin's present mental condition. The

defendants are not responsible for her status as a former patient and whatever stigma (if one exists at all) that Mrs. Gotkin might have in the eyes of the general public has no relation to the defendants' declinations to release certain records to her.

An additional reason why plaintiffs' "liberty" argument must fail is that there is not a "long recognized" privilege at stake in their claim to see the records.

See supra, 18-25.

For a further discussion of the "liberty" issue, the Court is respectfully referred to the Brief of Brooklyn State Hospital.

POINT II

THE ACTIONS OF DEFENDANTS RABINER  
AND LONG ISLAND JEWISH-HILLSIDE  
MEDICAL CENTER WERE NOT PERFORMED  
UNDER COLOR OF STATE LAW AND DID  
NOT AMOUNT TO STATE ACTION. THERE-  
FORE, THE PLAINTIFFS CANNOT INVOKE  
THE PROTECTION OF THE FOURTEENTH  
AMENDMENT AND 42 U.S.C. §1983.

A principal element which a plaintiff must demonstrate in an action under 42 U.S.C. §1983 is that the alleged deprivation of his constitutionally guaranteed right occurred "under color of state law". E.g., Shirley v. State National Bank of Conn., 493 F. 2d 739, 741 (2d Cir. 1974); Powe v. Miles, 407 F. 2d 73, 79 (2d Cir. 1968); Hernandez v. European Auto Collision, 346 F. Supp. 313, 317 (E.D.N.Y. 1972). This requirement is synonymous with the "state action" requirement of the Fourteenth Amendment. United States v. Price, 383 U.S. 787, 794-95, 86 S. Ct. 1152, 1157 (1966); Shirley v. State National Bank of Conn., supra, 493 F. 2d at 741.

With respect to voluntary hospitals, the courts have recognized that neither state regulation nor government funding, nor a combination of both make their

activities the equivalent of state action. In the leading case of Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971) the court dismissed an action brought by two physicians who alleged that they had been deprived of procedural due process by their discharge without notice and a hearing. The plaintiffs asserted that receipt by the hospital of government funding, coupled with pervasive state regulation of the hospital's activities, provided the requisite state involvement. The court rejected these arguments, finding no state action since these factors did not touch on the internal employment policies of the hospital. Thus, the Court stated:

"There can be little doubt that the State of New York plays a substantial role in supervising the operations of private hospitals within its borders. However, this fact does not get us very far. The state, as part of its general regulatory scheme, does not in any way associate itself with or influence the internal decisions of a hospital's board of trustees to hire or fire staff members. The mere fact that New York regulates the facilities and standards of care of private hospitals or offers them financial support does not make the acts of these hospitals in discharging physicians the acts of the state." 329 F. Supp. at 1023. (Emphasis added.)

Similarly, in Communications Workers of America, Local 10317 v. Methodist Hospital of Kentucky, Inc., 368 F. Supp. 564 (E.D.Ken.1974), a civil rights action alleging an unlawful interference with union organization, the Court found no federal jurisdiction over the actions of a private hospital, since a nexus between the challenged action and the federal funding was lacking. See also, Jackson v. Norton-Childrens Hospitals, Inc., 487 F. 2d 502 (6th Cir. 1973); Ward v. St. Anthony Hospital, 476 F. 2d 671 (10th Cir. 1973); Bricker v. Sceva Speare Memorial Hospital, 281 A. 2d 589 (N.H.1971) cert. denied, 404 U.S. 995, 92 S. Ct. 535 (1971).

This result is in accord with the recent holding of the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972), which firmly established that to sustain a claim of state action by private parties, the plaintiff must show a significant state involvement in the specific complained of activity. See also, Grafton v. Brooklyn Law School, 478 F. 2d 1137 (2d Cir. 1973) (Friendly, J.); McGuane v. Chenango Court, Inc. 431 F. 2d 1189 (2d Cir. 1970), cert. denied, 400 U.S. 1023, 91 S. Ct. 1231 (1972); Powe v. Miles, 407 F. 2d 73, 81-82

(2d Cir. 1968); Kelly v. Wisconsin Intercollegiate Athletic Assn., 367 F. Supp. 1388, 1390 (E.D. Wis. 1974).

In the instant case the plaintiffs have not alleged any facts which indicate that the hospital's actions are the actions of the state. Nor do they allege that the state is involved in establishing the hospital's policy regarding the disclosure of psychiatric records. On the contrary, as indicated in the affidavit of Dr. Robert K. Match, (A-61) none of the hospital's contacts with government, either through funding or regulation, relate to the hospital's psychiatric records policies and this internal administrative policy is not dependent on any state involvement. Absent the direct nexus required between the state involvement and the complained of conduct, the application of the hospital's policy and its declination to turn over the Gotkin records cannot be viewed as constituting state action.

Other cases, such as Sams v. Ohio Valley General Hospital Assn., 413 F. 2d 826 (4th Cir. 1969) and Simkins v. Moses H. Cove Memorial Hospital, 323 F. 2d 959 (4th Cir. 1964) are inapposite because the acts there complained of involved racial discrimination or other

equal protection issues which are not involved in the instant case. This distinction has been clearly recognized by a line of Second Circuit cases, which state that a lesser degree of involvement need be shown to warrant a finding of state action in equal protection cases. E.g., Wahba v. New York University, 492 F. 2d 96, 100-101 (2d Cir. 1974); Grafton v. Brooklyn Law School, supra, 478 F. 2d at 1141; Powe v. Miles, supra, 407 F. 2d at 82.

For a further discussion of this point, the Court is respectfully referred to the brief of Gracie Square Hospital.

POINT III

PLAINTIFFS HAVE FAILED TO DEMONSTRATE  
A VIOLATION OF ANY OTHER CONSTITUTIONAL  
PROVISION.

For a response to the plaintiffs' Fourth  
Amendment, autonomy and privacy arguments, the Court is  
respectfully referred to the brief of Brooklyn State  
Hospital.

POINT IV

JUDGMENT IN FAVOR OF THE DEFENDANTS  
AS A MATTER OF LAW WAS APPROPRIATE.

Having once determined that plaintiffs' claims did not raise issues of constitutional dimension, the Court properly granted judgment in favor of the defendants as a matter of law. There were no significant facts in dispute in this case because the defendant hospitals acknowledged that Mrs. Gotkin was a former patient, that they held records relating to her treatment, and that they would not permit her direct access to those records for the purpose of writing a book. These are the only material facts and they are not disputed. Such questions as whether there was a state-wide policy which denied all former patients direct access to their records and what justification the defendants had in declining direct access to the plaintiffs, which plaintiffs contend are factual questions that prohibit judgment as a matter of law, become relevant only if the plaintiffs have a constitutionally protected right. Since they have no such right, these so-called factual questions are not material in this case. Accordingly, judgment as a matter of law was appropriate.

For a further discussion of this point, the Court is respectfully referred to the brief of Brooklyn State Hospital.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the order of the Court below should be affirmed.

Respectfully submitted,

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New York Public Health Law, §17  
(McKinney's Supp. 1974)

§17. Release of medical records.

Upon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records regarding that patient to any other designated physician or hospital, provided, however, that such records concerning the treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient shall not be released or in any manner be made available to the parent or guardian of such infant. Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses.

Effective Date: July 1, 1974



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